

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

KATHLEEN WILSON)	
)	
Plaintiff,)	
)	
vs.)	Docket No: 09-2687
)	
DELTA AIRLINES, INC., Successor to)	JURY DEMANDED
NORTHWEST AIRLINES, INC., and)	
JOHN DOE,)	
)	
Defendants.)	

**PLAINTIFF'S MOTION TO AMEND COMPLAINT AND AMENDED COMPLAINT
TO SUBSTITUTE AND NAME JAMES HUGH WEBB
AS THE REAL PARTY IN INTEREST FOR "JOHN DOE"**

COMES NOW the Plaintiff, Kathleen Wilson ("Plaintiff"), and moves the Court pursuant to Rules 15(A), (B) and (C), F.R.C.P., and respectfully shows unto the Court as follows:

**I.
Introduction**

The above matter was filed with the Court on October 26, 2009 (Dk #1). A Summons was issued to Defendant, Delta Airlines, Inc. ("Delta"), which moved to dismiss (Dk #9). The Motion to Dismiss was denied (Dk #16), and Delta filed its Answer on February 1, 2010 (Dk #22). Plaintiff filed a Motion to Amend her Complaint, which was granted (Dk #24), joining Defendant, Northwest Airlines, Inc. ("NWA"). Delta and NWA have now both answered the Complaint and Amended Complaint (Dk #38).

A. Rule 26 Disclosures/Protective Order/Request for Production of Documents

Delta sought a Protective Order relieving it from disclosing the passenger manifest and/or the name of John Doe. Magistrate Vescovo granted the Motion (Dk #36) requiring only a

redacted passenger manifest and the revelation of John Doe's name.

Delta furnished the name of John Doe, which is James Hugh Webb.

B. Rule 4(m), F.R.C.P.

Rule 4(m), F.R.C.P. provides in part: "if a defendant is not served within 120 days after the complaint is filed, the court - - must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for an appropriate period - -."

Plaintiff submitted that having just learned the name of John Doe, she had shown good cause and requested the Court to extend the time to serve the Complaint on Webb of Sylvania, Ohio.

C. The Court granted Plaintiff's Motion (Dk #40), directing Plaintiff to effect service by April 18, 2010.

D. John Doe n/k/a James Hugh Webb ("Webb") was served on March 26, 2010 (Dk #44) and filed a Motion to Dismiss on April 29, 2010 (Dk #50).

**II.
Applicable Rules**

Webb's Motion to Dismiss is not a responsive pleading under Rule 7(a), F.R.C.P. (*Maldonado v. Dominguez*, 137 F.3d 1, 11 [1st Cir. 1998]) However, under the current Rules, Plaintiff requires Webb's (and Delta's) consent; Webb's counsel refuses to consent.

**III.
Relief Sought**

Plaintiff seeks to amend the Complaint and Amended Complaint for the purpose to reflect James Hugh Webb in place of "John Doe"; to reflect Plaintiff's dismissal of June 30, 2010 of Count V only of the Complaint and Amended Complaint; and to conform the allegations to

reflect the names of Jane Roe and John Roe.

Suffice it to say, the proposed amended pleading attached hereto as Exhibit A arises under the same set of facts as the original Complaint (F.R.C.P. 15(c)(1)(B)); and Webb was timely served once identified through discovery and pursuant to the Order of the Court (Dk #40). Webb has had notice of the Court's Order (Dk #40) and has been served, so this proposed amendment to now name him as John Doe is without prejudice to him.

Basically, this matter could be viewed as a "misnomer" because Webb was unknown to Plaintiff until Delta, under a Protective Order, revealed his name. Accordingly, this request to amend relates back to the original filing of the Complaint.

Additionally and/or alternatively, this is to conform the pleadings to the "proof" (names) as it now stands.

Webb, once he was served with the Summons, knew that regardless of the caption, he was John Doe, constituting sufficient notice, and he would know that he would have been sued (named) originally had his name been known to Plaintiff.

WHEREFORE, premises considered, Plaintiff moves for an order allowing her to file the attached Second Amended Complaint reflecting James Hugh Webb as a named party and that she be granted such other and further relief to which she may be entitled.

Respectfully submitted,

s/ Stephen H. Biller
Stephen H. Biller (#7764)
The Biller Law Firm
6000 Poplar Avenue, Suite 250
Memphis, Tennessee 38119
(901) 261-5454
sbiller@thebillerfirm.com
Attorney for Plaintiff

Certificate of Service

I, Stephen H. Biller, do hereby certify that a true and correct copy of the foregoing was served upon: David Feigelson, Annie T. Christoff, John S. Golwen and Craig J. Lazarov by electronic mail this the 1st day of July, 2010.

s/ Stephen H. Biller
Stephen H. Biller